

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TDS METROCOM, LLC)	
)	
Employer,)	
)	
and)	
)	CASE NO. 18-RC-260318
COMMUNICATIONS WORKERS OF)	
AMERICA, DISTRICT 4)	
)	
Petitioner.)	
)	

**CWA DISTRICT 4’S STATEMENT IN OPPOSITION TO TDS METROCOM’S REQUEST FOR
REVIEW OF THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

CWA now comes before the Board pursuant to Section 102.67(f) of the Board’s Rules and Regulations and hereby submits its Statement in Opposition to the Employer’s Request for Review of the Regional Director’s (“RD”) Decision and Direction of Election issued May 29, 2020.

Standard of Review

Section 102.67(d) of the Board’s Rules and Regulations sets forth the standard in which the Board will grant review of a RD’s decision:

- (d) Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.

- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Discussion

The Employer requests review of the RD's decision to conduct a mail ballot election in the underlying representation proceeding. However, the Employer has failed to present any substantive reason warranting review of the RD's decision in this respect. Accordingly, the Board should deny the Employer's request.

First, the Employer argues that the RD's decision "departs from longstanding precedent." As the Employer correctly notes, the applicable precedent is set forth in *San Diego Gas and Electric*, 325 NLRB 1143 (1998). There, the Board clarified its standards regarding mail ballot elections. Accordingly, it is worth quoting at length:

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). The Board in turn has delegated to the Regional Directors discretion in determining the arrangements for an election, including the location of the election and whether it should be conducted by manual balloting or mail ballot. Halliburton Services, 265 NLRB 1154 (1982); National Van Lines, 120 NLRB 1343, 1346 (1958).

When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern. *We*

also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above. (emphasis added) (*Id.* at 1144-45)

Citing serious concerns relating to the COVID-19 pandemic heavily impacting the United States, and relying on guidance from federal and state health authorities, the RD ordered the underlying representation election be conducted via mail ballot. There can be no question that the COVID-19 epidemic presents an “extraordinary circumstance”: as of June 17, 2020 there were 2,132, 321 confirmed cases of infection and 116,862 deaths attributed to the virus within the United States alone. (see <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>, last visited June 18, 2020) Given the extraordinary risks associated with the pandemic, the RD’s decision was appropriate and fully within the discretion afforded pursuant to the decision reached in *San Diego Gas and Electric*.

The Employer argues that the RD failed to consider the three factors specifically enumerated in *San Diego Gas and Electric* (geographic work area, work schedules and presence of a strike/lockout). There is no indication that the RD failed to consider these factors. Rather, it appears the RD correctly decided that these factors were outweighed by the “extraordinary circumstances” presented by the COVID-19 health epidemic. Hence, the RD’s decision was made in full accord with existing precedent.

Next, the Employer argues that the RD’s decision was based on “erroneous and prejudicial factual findings.” Astoundingly, the Employer argues that “The Regional Director blindly applies general guidance from federal and state agencies . . .” (Er. RFR p. 5) The Employer goes on to downplay the risks associated with the COVID-19 pandemic, and appears to take umbrage with the federal and state health agencies recommendations against travel.

While the Employer may have its own ideas and opinions about the risks associated with the COVID-19 pandemic, the RD chose to rely upon the specific guidance from governmental agencies charged with the task of protecting the health and safety of US citizens. It strains credulity to argue that the RD made “prejudicial factual findings” in predicated her decision upon such advisories.

Finally, the Employer argues that the instant circumstances warrant review because “There should not be a one-size-fits-all . . . approach . . . particularly given the uncertainty as to how long the public will be faced with the COVID-19 situation and regional variations in the risks of transmission.” (Er. RFR p. 10) However, the Board has already delegated the authority and discretion to regional directors in determining whether and when a mail ballot election should be conducted. Each regional director is best suited to make determinations based upon the particular interests of their respective jurisdictions, and based upon the circumstances of each particular case. Hence, the approach advocated by the Employer is already the approach set forth by the Board. Because the Board has already issued the precise guidance sought and urged by the Employer in *San Diego Gas and Electric*, there is no compelling reason for the Board to review or reconsider any policy or rule.



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following individuals via email on this the 18th day of June, 2020.

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